

LING TEE HUAH CREDIT & LEASING SDN. BHD. & ORS.

v.

LII TAT CREDIT MORTGAGE SDN. BHD. & ANOR.

HIGH COURT BORNEO, SIBU

CHONG SIEW FAI J

[ORIGINATING SUMMONS NO. 23 OF 1988]

30 MARCH 1989

LAND LAW: *Caveat - Removal of caveat - Loan agreement - Condition of loan agreement allowing lender to enter caveat over borrowers' property - Whether caveatable interest exists - Notice of prior registered charge and covenant against registration of dealings - Locus standi of registered chargee and co-proprietors to apply for removal of caveat - Section 177(1) Land Code.*

This was an application by the registered chargee (1st plaintiff) and registered co-proprietors (2nd - 8th plaintiffs) for removal of a caveat, entered by the lender (1st defendant) pursuant to a loan agreement between the 1st defendant and the 2nd defendant (proprietor of 1/8 undivided share of the property). The loan agreement allowed the lender to enter a caveat. The lender knew of the prior registered charge of the 1st plaintiff and the covenant against registration of dealings. The issue raised by the plaintiffs were that the 1st defendant had no caveatable interest within the scope of s. 173(a) Land Code and that the 2nd defendant, being a party to the prior memorandum of charge, had put himself under a legal disability to enter into the loan agreement. The 1st defendant contended that the 1st plaintiff lacked the necessary *locus standi* to apply for removal of caveat due to absence of privity of contract. It was also argued that the basis for lodging the caveat was its claim "to be entitled to or to be beneficially interested" in the 2nd defendants 1/8 undivided share or alternatively, that the 2nd defendant held his share in 'trust' for the 1st defendant, entitling the latter to enter a caveat under s. 173(a) of the Land Code.

Held:

[1] The loan agreement was not a memorandum of charge, neither was it an agreement to create a charge capable of registration and as such, there was no caveatable interest within the scope of s. 173(a) of the Land Code;

[2] The 2nd defendant (borrower) could legally enter into the loan agreement and was not constrained by any legal disability in this respect;

[3] The 2nd defendant (borrower) was however under a disability to create a further charge or agreement to grant further charge capable of conferring a registrable interest in land in respect of which a caveat may be lodged;

[4] The borrower's consent does not by itself give rise to a registrable interest capable of sustaining the entry of a caveat;

[5] There was no evidence neither was there an intention to create a trust capable of sustaining a caveat within the scope of s. 173(a) of the Land Code.

[Application for removal of caveat allowed, with costs to be paid by 1st and 2nd defendants.]

a Cases referred to:

Pok Kew Chai v. Yeoh Thian Seng & Anor. [1975] 1 MLJ 220

R & I Securities Sdn. Bhd. v. Golden Castle Finance Corporation (M) Bhd. [1979] 1 MLJ 46

Legislation referred to:

National Land Code 1965, s. 326(1)

Land Code (Cap 81) (Sarawak), ss. 177(1), (2), 173(a)

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For the plaintiffs - George Lim; M/s. Battenberg & Talma

For the 1st defendant - Lily Wong; M/s. Thomas Co.

For the 2nd defendant - absent

JUDGMENT

Chong Siew Fai J:

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This is an application to remove a caveat dated 14 March 1987 lodged by the 1st defendant (a limited company) and registered at the Sibu Land Registry office on 18 June 1987 as Instrument No. L.3616/1987 against 1/8 undivided share in a parcel of land described as Lot 3206 Seduan Land District, Sibu together with the buildings thereon and appurtenances thereof belonging to the 2nd defendant Ling Ting Sing.

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Ling Ting Sing was by order of Court made on 9 November 1988 added as the 2nd defendant in this action.

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The basis for lodging the caveat is that the 1st defendant claims "to be entitled to or to be beneficially interested" in the 2nd defendant Ling Ting Sing's 1/8 undivided share in the said land by virtue of a loan agreement dated 27 February 1987 made between the 1st defendant as lender and the 2nd defendant as borrower under which the latter borrowed from the 1st defendant a sum of RM60,000. One of the conditions of the said loan agreement reads:

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7. The borrower hereby agrees that the lender shall have the liberty to caveat all or any of the borrower's landed properties already acquired or hereafter to be acquired by the borrower and such caveat or caveats shall not be withdrawn or defeated by lapse of time until the said loan together with interest thereon has been fully repaid by the borrower.

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The registered owners of the said land Lot 3206 were plaintiffs Nos. 2 to 8 and the 2nd defendant, each holding 1/8 undivided share. Prior to the 2nd defendant entering into the said loan agreement dated 27 February 1987, all the 8 co-owners including the 2nd defendant had charged the land to the 1st plaintiff (a limited company) by a memorandum of charge dated 20 December 1985 and registered at the Sibu Land Registry office on 21 February 1986 as Instrument No. L. 808/1986. As is normally the case, the said charge contains a covenant against dealing during the existence of the charge, and it reads:

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And we, ... (i.e., plaintiffs Nos. 2 to 8 and the 2nd defendant) the registered co-proprietors/ proprietresses and Ling Tee Huah Credit and Leasing Sendirian Berhad, the chargee, hereby agree that during the period of this charge, no dealing shall be registered against the property unless the chargee has given its consent to such registration.

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The loan agreement dated 27 February 1987 containing the clause allowing the 1st defendant to caveat the 2nd defendant's lands then or thereafter acquired was made and the caveat Instrument No. L.3616/1987 sought to be removed in this action was registered without the consent of the 1st plaintiff as the prior chargee. And the 1st defendant admitted having, at all material times knowledge of the existence of the covenant against dealing in the above-mentioned.

The said land Lot 3206 was subsequently subdivided into 8 lots each with a separate land title with the plaintiffs Nos. 2 to 8 and the 2nd defendant each holding 1/8 undivided share in each of the 8 lots. All the 8 land titles were issued on 16 October 1987 and had the caveat L.3616/1987 lodged by the 1st defendant registered thereon. (See Exhs. 'G', 'H', 'I', 'J', 'K', 'L', 'M' and 'N' annexed to the affidavit affirmed by plaintiffs Nos. 4, 5, 6 and 7 on 23 August 1988).

The 1st defendant having refused to comply with the demand contained in the letter issued on 8 January 1988 on behalf of plaintiffs Nos. 2 to 8 and the 2nd defendant, the plaintiffs began this action.

There is undisputed evidence that a semi-detached house has been built on each of the subdivided lots and each of the plaintiffs Nos. 2 to 8 and the 2nd defendant either by themselves or their assigns or representatives are occupying one unit. Some of them have entered agreements with others for the resale of the houses.

At the hearing of this application on 5 January 1989, the 2nd defendant did not appear nor was he represented. He had made two affidavits: one on 24 August 1988 filed on behalf of the plaintiffs and the other on 29 October 1988 filed on behalf of the 1st defendant. In the second affidavit he retracted the first affidavit contending that he could not read or understand English and did not fully understand the content in the latter. Without properly satisfying myself of the 2nd defendant's contention about his inability or failure to understand, I was not prepared to accede to the defence submission that the first affidavit should not be used. However, the matter was dropped as Counsel abandoned the issue, leaving it to me to give whatever weight as may be considered properly due to the deponent's evidence. Be that as it may, in coming to the conclusion of this action, I have not found it necessary to rely upon any of the matters stated in the 2nd defendant's first affidavit.

There is evidence that plaintiffs Nos. 2 to 8 and the 2nd defendant had executed a 'memorandum of transfer by way of partition' dated 1 December 1987 under which each of them was to be exclusively allocated a subdivided lot (Exh. 'E' annexed to the 4th plaintiff's affidavit) and that it could not be registered because of the caveat lodged by the 1st defendant. These have not been denied by both defendants.

It ought also to be pointed out that no specific relief has been claimed against the 2nd defendant in this action. This probably was because initially the 2nd defendant was agreeable to the relief sought in this application. There was a subsequent change of mind and, as a result, he, instead of being joined as a co-plaintiff as intended by the plaintiffs, was added as a co-defendant.

For the 1st defendant, it was first contended that the 1st plaintiff had no *locus standi*, there being no privity of contract between it and the 1st defendant and that the 1st plaintiff therefore had no right to ask for the removal of the 1st defendant's caveat and the joinder of the 1st plaintiff in this action was misconceived. With respect, I am unable to agree. Section 177(1) of the Land Code provides:

Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at any time, if he thinks fit, apply to the High Court for an order that the caveat be removed.

It is not disputed that the 1st plaintiff is a registered chargee. The 1st defendant had lodged a caveat against the estate or interest in which the 1st plaintiff has a registered estate or interest. The 1st plaintiff complains that the 1st defendant has no caveatable interest and

- a** that there has been a breach of the covenant against dealing without its consent as stipulated in the charge. In my opinion, the 1st plaintiff comes within the said s. 177(1) and is entitled to apply. In *Pok Kew Chai v. Yeoh Thian Seng & Anor.* [1975] 1 MLJ 220 it was held that a chargee had *locus standi* under s. 326(1) of the National Land Code 1965 to apply for the removal of a caveat. While it is true that the provisions in the said two sections of the 2 Codes are not the same, s. 177(1) of the Sarawak Land Code appears more liberal in that it enables any person having a registered estate or interest in the estate or interest against which a caveat has been lodged to apply to the Court.

b In the case of the other plaintiffs (i.e., other than the 1st plaintiff), the 'memorandum of transfer by way of partition' which the 2nd defendant had also signed could not be registered because of the caveat lodged by the 1st defendant. They are registered co-proprietors of the sublots. They are also affected and accordingly have the *locus standi* to seek relief.

- c** It was also submitted for the 1st defendant that the caveat it lodged, claiming an interest in a specific portion of the land and having the effect of covering only the particular interest claimed, was regular, in proper form and consistent with the provisions of the Land Code. However the form of the caveat and the procedural regularity of lodging it are not in issue. The application for the removal of the caveat relies on grounds other than for the want of proper form or procedural irregularity in its lodging.

d Jurisdiction of the Court to remove a caveat is governed by s. 177(2) of the Land Code which provides:

The Court, upon proof that notice of such application has been duly served, may make such order in the premises, either *ex parte* or otherwise, as in the circumstances seems just.

- e** The application is based on two grounds.

f Firstly, it was contended for the plaintiffs that the 2nd defendant, Ling Ting Sing, by creating the memorandum of charge containing the covenant prohibiting registration of any dealing against the said land Lot 3206 during the period of the charge, had put himself under a legal disability to enter into the loan agreement dated 27 February 1987. With respect, there is, in my judgment, no merit in the contention. I fail to see why he could be incapable of entering into the loan agreement though the question of lodging a caveat by virtue of the agreement requires different consideration.

- g** I agree with the contention raised on behalf of the 1st defendant that a caveat does not come within the definition of 'dealing' and the covenant in the charge Instrument No. L.808/1986 prohibiting the registration of dealing without the consent of the 1st plaintiff, therefore, is of no assistance to the 1st plaintiff. However, this does not conclude the matter, for the second contention of the plaintiffs is that the 1st defendant has no caveatable interest in the 2nd defendant Ling Ting Sing's 1/8 share in each of the 8 sublots and the loan agreement does not entitle the 1st defendant to lodge the caveat.

h To have a caveatable interest, the 1st defendant must come within the scope of s. 173(a) of the Land Code the relevant part of which reads:

Any person:

- i** (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever; ... may at any time lodge with the Registrar a caveat in Form O in the first schedule.

Upon close examination of the loan agreement, it is clear that it is not a memorandum of charge capable of being registered as such under the Land Code; nor is it to all intents and purposes an agreement for a charge. It does not stipulate a promise by the 2nd defendant to charge his land nor does it indicate that the loan had any connection with the land. Clause 7 thereof which has been reproduced above merely stipulated agreement on the part of the 2nd defendant as borrower to allow the 1st defendant as lender to caveat the 2nd defendant's landed properties already acquired or to be acquired. The agreement, it may be noted, was granted with full knowledge on the part of both defendants of the existence of the charge created by the registered landowners including the 2nd defendants in favour of the 1st plaintiff with express covenant against registration of dealing without the consent of the 1st plaintiff as the chargee. Assuming the 2nd defendant could give consent to the entry of the caveat, such a consent by itself does not, in my opinion, give rise to a registrable interest capable of sustaining the entry of a caveat. It is clear that a caveat is not an instrument of dealing and by itself confers no registrable interest. It does not create an interest or estate but merely acts as a notice of claim to interest or title to land. Since the 1st defendant has not obtained a registrable interest under the loan agreement, it cannot lodge a caveat by virtue thereof. Furthermore, in the affidavit of Ting Pik King made on 20 April 1988 on behalf of the 1st defendant as its managing director, it was admitted that the loan agreement was not meant for registration, and in para. 5 thereof, Ting Pik King admitted that there was no dealing to be registered. That being so, the caveat is all the more reason unsupportable.

I am aware that in para. 5 of his second affidavit the 2nd defendant deposed that when he agreed to allow the 1st defendant to caveat his 1/8 share in the said land the intention was that "the same" should be security for the loan. It is obvious from the said para. 5 that the expression "the same" means the caveat. As stated earlier, a caveat by itself confers no registrable interest.

As regards the credibility of the 2nd defendant, he has at least proved to be capable of giving evidence without proper care and without first ensuring it had been properly understood. His evidence must be treated with extreme care. Having considered his evidence and his conduct in this case, I find him unreliable.

Now, assuming that the loan agreement could be regarded as an unregistered charge or an agreement to charge the land as security for the loan, owing to the lack of consent from the 1st plaintiff as the prior chargee, there cannot arise a 'dealing' or 'instrument' as defined in the Land Code capable of conferring any registrable interest in the land in respect of which a caveat may be entered. *R & I Securities Sdn. Bhd. v. Golden Castle Finance Corporation (M) Bhd.* [1979] 1 MLJ 46. In that case the registered landowner, after having charged its land to Golden Castle Finance Corporation (M) Bhd., sought to charge the land to R & I Securities Sdn. Bhd. without the consent of the Corporation which refused to grant it. The first charge contained a clause forbidding the landowner from charging or dealing with the land charged without the prior written consent of the chargee. And it was held that the landowner had by the said clause disabled itself from creating further charges without the consent of the first chargee. The same principle applies to the instant case. Without the consent of the 1st plaintiff as the prior chargee, the 2nd defendant was under a disability to create further charge or agreement to grant further charge capable of conferring a registrable interest in land in respect of which a caveat may be lodged.

A feeble attempt was made suggesting that the 2nd defendant held his 1/8 share in the land in trust for the 1st defendant and that by virtue of the trust, the caveat came within s. 173(a) of the Land Code. With respect, I am unable to accept the contention. There is no evidence of a trust, nor evidence capable of suggesting the existence of a trust.

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a As for the 1st defendant, there is clear evidence from the affidavit of its managing director Ting Pik King sworn on 20 April 1988 that the 1st defendant was fully aware of the restriction to register any dealing against the land without the consent of the 1st plaintiff. The loan was advanced with full knowledge of the situation.

b Having regard to all the facts and circumstances, I consider it just and proper that the caveat lodged by the 1st defendant ought to be forthwith withdrawn.

c For the above reasons and pursuant to s. 177(2) of the Land Code, the application is allowed. I order that the caveat dated 14 March 1987 lodged by the 1st defendant and registered at the Sibu Land Registry Office on 18 June 1987 as Sibu Instrument No. L.3616/1987 affecting the said land Lot 3206 Sibu Town District now known as Lot 390 to Lot 397 (both inclusive) all in Block 10 Seduan Land District be forthwith withdrawn. There shall also be an order that costs of this application be paid by the 1st and the 2nd defendants to the plaintiffs. In the absence of an agreement, such costs may be taxed.

Also found at [1990] 1 CLJ 303

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